Title:
Commonwealth Crimes Bill, 1960 [Discussion of the implications of the 'proposed amendments to the "political" sections of the Crimes Act'.]

THE COMMONWEALTH CRIMES BILL, 1960

The introduction of this Bill into the Commonwealth Parliament by the Attorney General has aroused widespread public discussion and has moved many responsible citizens of all shades of political opinion to express substantial misgivings in relation to the proposed amendments to the "political" sections of the Crimes Act.

An attempt is made here to examine some of the main features of the proposed amendments and their effect especially on civil liberties and on particular groups in the community who are directly concerned with the provisions of the Bill.

In the case of many of the amending provisions of this Bill other than those relating to "political" offences, there can be no proper ground of criticism. The clauses dealing with coinage offences and those reflecting changes in the community's approach to the treatment of offenders, including juvenile offenders, are, broadly speaking, unobjectionable and indeed, proper provisions.

But it is difficult to regard the proposed "political" amendments with the same benevolence. These amendments greatly extend the scope of the present "treason" provisions, create two new crimes of "Treachery" and "Sabotage", and significantly increase the ambit of the offences of "espionage" and "disclosure of official secrets". They are extremely far-reaching and require careful scrutiny. When examined in detail, the amendments will be seen, not withstanding the Attorney General's assertions to the contrary, to contain substantial departures from the tradition of British justice in this field. Of special concern is the possibility that proper and forceful criticism of the Government's foreign policy could be punished or at least inhibited. It may be noted that the Attorney General has himself said that the main worth of the new provisions lies in the deterrent field.

In advising on the effect of these "political" provisions in the Bill, I am aware that the comments which follow do not cover the whole ground and there are a number of other difficulties which others may see fit to raise.

PROPOSED SECTION 24

This clause repeals the treason section in the Principal Act, and substitutes a new Section 24 (I), which widens the scope of "treason" in the following respects:-

1. "Treason" was formerly confined to instigating a foreigner to make an armed invasion of the Commonwealth or any part of the King's Dominions, or to assisting by any means whatever any public enemy, and under either heading the offence was limited to acts done within the Commonwealth or any territory.

2. The proposed Section 24 (1) greatly enlarges the existing scope of the offence of treason, removes the territorial limitation and asserts jurisdiction to try persons for the crime of "treason" wherever committed. Thus, any person, whether an Australian or not, and whether in Australia or elsewhere, who kills the Sovereign or does any of the acts mentioned in Section 24 (1) to (f) is to be triable by Australian Courts. Since theessence of the crime of treason lies in the violation of the allegience owed to the Sovereign by all British subjects, it is obvious that this assertion of jurisdiction over acts done outside the Commonwealth or its Territories must be read down so as to apply only to those of Australian nationality. Otherwise, some extraordinary results would follow.

3. The new sub-section 1 (c) makes it treason to levy war, or to do any act preparatory to levying war against the Commonwealth. The Attorney General says that the expression "levying war" is well known in the law; but there is certainly no recognized test for determining whether any particular "act" is an "act preparatory to levying war". Does the sub-section contemplate an act preparatory to the person himself levying war or preparatory to some other person or persons levying war against the Commonwealth?

It may be noted that the English provision against levying war has been held to extend to cases of riot for various general purposes. The principles in this branch of law are ill defined and the law of treason as expounded in the decided cases has been unduly

stretched, according to eminent authority Sir James Stephen. In R.V. Lord Gordon (1781) 21 State Trials 485, Lord Mansfield C.J. said: "Insurrections by force and violence to raise the price of wages, to open all prisons, to destroy meeting houses, nay to destroy all brothels, to resist the execution of militia laws, to throw down all enclosures, to alter the established law, or change religion, or to redress grievances real or pretended, have all been held levying war". And Lord Mansfield further said in the same trial: "I tell you the opinion of us all is that if this multitude assembled with intent, by acts of force and violence, to compel the Legislature to change a law, it is high treason. Whoever incites, advises or is in any way encouraging to such a multitude assembled with such intent, though he does not personally appear among them, yet he is equally a principal."

It will thus be apparent that the boundary line may be very narrow between "insurrection by force and violence to raise the price of wages", on the one hand, and militant industrial action by trades unionists to "raise the price of wages" or to secure other improvements in conditions of employment, on the other hand. This may be especially so at times of strong public feeling when some industrial action by a trade union or its officers has been under attack by the press. Jurymen empanelled to try such a case would be drawn from readers of the press. The point of criticism is not that all trade union direct action may be called "levying war" but that some forms of direct action, if met provocatively and perhaps with force or violence by the Government and police, may become capable of being termed "treason" and punishable by the Section with the death penalty. The trade union official who has acted in support of strong direct action but who is not present at the actual demonstration may nevertheless be doing an "act preparatory to levying war".

4. Section 24 (I) (d) adds a novel but far reaching provision to the crime of assisting the King's enemies. This new sub-section makes it treason to assist by any means whatever an enemy at war with the Commonwealth, whether or not the existence of a state of

war has been declared. To the first part of the provision, which appears in substance the old Act, there can be no objection, notwithstanding the very wide scope of the expression "assist by any means whatever". But the citizen who may be called upon to face a charge for an offence carrying the death penalty or any other penalty is entitled to have the offence clearly defined. This is of the essence of our system of law and justice.

But this sub-section is badly drafted and dangerous. It does not even specify whether it refers to a declaration of war by Australia or by the enemy. It contemplates a de facto state of war between the Commonwealth and another country. It may be true, as the Attorney General says, that these days a declaration of war is old fashioned. Presumably he is speaking of a declaration by Australia's potential enemies, and not by Australia. We may hope that no Australian Government will regard itself as at war with another country without declaring so plainly and without equivocation. Professor Julius Stone, in his definitive work on "Legal Controls of International Conflict" at p. 310, deals with three situations governing the movement of the commencement of war between nations. First, upon communication of a formal declaration of war; second, on the commission of some act of force by one party intended to terminate legal relations of peace between the parties; or third, even if that first party had no such intent, if the other elects to treat the act of force as being done with that intent. In this third situation, says Professor Stone, "the state of war dates back retrospectively to the first act of force thus treated as a casus belli". Presumably the amendment is designed to cover the period between the other side's act of force and Australia's election to treat the act of force as an act of war. Thus the effect of the amendment in practice is to make certain activity treasonable, as it were, retroactively. The individual acts at his peril in the absence of a declaration of war by his own Government. His life may depend upon whether he is right or wrong in deciding, as he may, that a particular country is not "an enemy at war with the Commonwealth" at the time of a particular act by him. He may

very well decide wrongly, since the experts on international law are unable to lay down any hard and fast rules for deciding this question. Professor Stone (at p.311) deals with this very problem and says: "Where a belligerent seeks to evade the legal or political consequences of war by not admitting or by denying that its warlike action is legally war, the difficult question may arise for a variety of purposes whether war does nevertheless exist in law". And he says: "The question "war or not war" may have to be answered differently according to the purpose for which an answer is sought."

In the light of such learned comment it will be clear that this particular sub-section is bristling with difficulties. This makes the sub-section so dangerously wide as to be unacceptable, especially having regard to the enormous scope of the phrase "assist by any means whatever". Take, for example, the Korean war referred to by the Attorney General. At one stage Chinese soldiers were fighting U.N. forces in the Yalu River area. They were called "volunteers" by the Chinese Government. Not everybody believed that they were simply volunteers. Suppose Australian soldiers were amongst those in action against them, upon the view that the Chinese Government's denial was false, Australia might well say: "China is an enemy at war with Australia". In such circumstances, any Australian advocating by speech or action recognition of the Government of China by the Commonwealth or exchanging information on trade, industrial conditions, health, cultural matters, or saying that the U.N. Command was taking a wrong or dangerous step in pursuing the North Koreans beyond the Yalu River might be held to be "assisting the enemy". Similarly, some industrial action taken by Australian workers in protest against sending Australian troops to Malaya to deal with Communists or terrorists there might be held to be "assisting the enemy", it being said that those Communists or terrorists were "an enemy at war with the Commonwealth". It may be noted that the section does not require an enemy to be a country or a nation. The enemy may be a group of persons within a country, as in the case of communists

or terrorists in Malaya. In the case of U.N. action, if Australians should be members of the U.N. force there, presumably any insurgent group fighting the U.N. forces could be regarded as an enemy at war with the Commonwealth, and any information given to that group, whether of a military character or otherwise, by persons in Australia or elsewhere, might be held to be assisting that enemy.

Finally it may be said by way of objection to this sub-section I (c) that, whilst there is provision in the new Section 24 AA for declaring a country to be a "proclaimed country" (that is, a friendly country) there is no similar provision for declaring a country to be an "enemy at war with Australia", except where there is a formal declaration of war.

Section 24 (I) (e) remains substantially as in the old Act. Section 24 (I) (f), makes it treason to form an intention to do any of the acts of treason specified, provided the intention is manifested by an overt act. Sub-section (3) introduces a proper protection for the person charged with treason under 24 (I) (f), in that no evidence of the overt act is admissible unless alleged in the indictment. This means that the person charged will have reasonable notice of what is alleged against him.

But the objection here is nevertheless even greater than with the earlier specified acts of treason. The citizen's offence here is the forming of an intention to assist an enemy at war with the Commonwealth whether or not the existence of a state of war has been declared. The overt act required to be proved is not an overt act of assistance to the enemy but merely an overt act evidencing the intention to assist. Thus, a speech or an article advocating diplomatic recognition of China at a time when Australians and Chinese were in de facto conflict without any declaration of war, might be held to be an overt act manifesting an intention to assist an enemy at war with the Commonwealth. Notwithstanding that it could not be proved that the speech or article was in fact of assistance to the enemy, once the intention to assist is proved, the person is still liable to the punishment of death for treason.

Section 24 (2) creates two offences. The first is of receiving or assisting a person whom the accused knows is guilty of treason. The provision is unobjectionable in principle. It exists in a similar form in relation to a wide variety of crimes under State laws. Even though there remains the difficulty arising from the imprecise specification of the particular acts of treason in sub-section (I), nevertheless the prosecution would be required to prove "knowledge" of treason, and not mere belief that the other person was guilty of treason.

But the second offence created by Section (2) (b) is open to much graver objection. It is the offence of failing to give information to a constable with all reasonable despatch or to use other reasonable endeavours to prevent the commission of treason by a person whom one knows to be intending to commit treason. It is a section designed to make informers out of husbands and wives, mothers and sons, brothers and sisters and friends. The penalty for failing to inform is imprisonment for life. Having regard to the imprecise specifications of the several acts constituting treason as set out in Section 24 (I)(a) to (f), an intolerable burden is placed on decent citizens by this provision. How can one know another man's intention? It should be noted that the obligation to give information in this situation does not depend upon the performance by the other man of an overt act manifesting his intention. Thus, in the examples referred to above, an intention to write an article or make a speech may be an intention to commit treason. Again, what are reasonable endeavours to prevent the commission of the offence will be decided by the jury's concept of the reasonable man. Has the person charged used "reasonable endeavours" if he has sat up half the night trying to talk his brother out of making a strong speech or taking part in direct industrial action?

It is no answer to say that this provision has appeared in other Statutes (e.g. Victorian Crimes Act s. 316 (4)). It is wholly unacceptable in democratic communities. It is one of the most detestable features of totalitarian Government that it is a crime

not to inform the Secret police when one's loved ones are engaged in political or other activity not approved of by the ruling clique. There is altogether too much scope here for abuse, perjury and the settling of private grievances. It will, as J.B. Chifley said, encourage "pimps and informers". It is such a typical feature of the Police State that it can never be justified except in times of the gravest emergency.

Section 24 AA introduces a new offence of "treachery", punishable by imprisonment for life.

Section 24 AA (1)(a) makes it treachery to do any act or thing whether in Australia or elsewhere in an attempt to overthrow the Constitution of the Commonwealth by revolution or sabotage, or to overthrow by force or violence the established Government of the Commonwealth, of a State or of a "proclaimed country".

Section 24 AA (1)(b) makes it treachery within the Commonwealth or a Territory not forming part of the Commonwealth -

(i) to levy war or do any act preparatory to levying war against a proclaimed country.

(ii) to assist by any means whatever an enemy of and at war with a proclaimed country whether or not the existence of a state of war has been declared.

(iii) to instigate a person to make an armed invasion of a proclaimed country.

Section 24 AA (2) makes it treachery to assist by any means whatever any persons against whom a part of the Defence Force on, or proceeding to, service outside the Commonwealth is or is likely to to be opposed.

Sub-section (4) and (5) define "proclaimed country" as a country so declared for the purposes of the section and provide that a proclamation shall not be made except in pursuance of a resolution of each House of Parliament passed within the twenty-one days preceding the proclamation.

According to the Attorney General, these provisions give the Government a ready means of preventing "certain activities" aimed at another country with which Australia has friendly and

co-operative relations, or which it may desire to assist or protect. The general objection to this section my be stated thus -- all the matters of criticism in relation to the offence of "treason" against the Commonwealth apply with even greater force in relation to so-called "treachery" against a "proclaimed country". If there are difficulties in the expression "levy war or doing any act preparatory to levying war against the Commonwealth" the difficulties are at least as formidable with the expression "levy war or do any act preparatory to levying war against a proclaimed country". So too with the expression "assist by any means whatever".

As to the existence of a state of war, between the proclaimed country and its enemy, how is a person in A stralia to know whether an undeclared state of war exists? Is this a matter to be proved by the Commonwealth Government. Does the Government of the proclaimed country decide whether it is engaged in an undeclared war? Is its decision to bind the Australian Courts?

It may be noted that the acts struck at by the Section are, by definition, acts within the Commonwealth (Unlike Sections 24 and 24 AA (1)(a), where treason and treachery are not limited to acts within the Commonwealth). Presumably the enemy of a proclaimed country is outside the Commonwealth. What kind of acts within Australia are likely to be within the contemplation of the Section except political non-conformism or trade union activity.

Examples may illustrate the possible scope of these provisions:

(a) Formosa is declared by proclamation to be a "proclaimed country". All contact with Peking China would then be assistance to "an enemy of" Formosa. All trading, all cultural exchanges, all reciprocal trade union courtesies would be punishable by life imprisonment.

(b) The United Arab Republic is declared by proclamation to be a "proclaimed country". Many Jewish citizens of Australia feel strong ties of kinship with and devotion to the upbuilding of the State of Israel. Any assistance which they might wish to give to strengthen Israel would clearly

put them in jeopardy under Section 24 AA, having regard to the hostile relations between Israel and certain of the Arab States.

(c) The United States of America is declared a "proclaimed country". Hostilities break out between the United States and Cuba. The Government of Australia joins in an economic blockade of Cuba. Australians attempting to send supplies, even non-military supplies, to Cuba would be assisting the enemy of the proclaimed country. Similarly, a call by some Australian citizens for an end of the blockade would be Treachery. A trade union refusal to load supplies to the United States would render those participating liable to be prosecuted under the Section.

In none of the above examples is Australia one of the belligerents.

As to the Defence Forces serving abroad -- If Australian Forces serving in Malaya are opposed to Communists there, is it a reasonable assumption that part of the Defence Forces is likely to be opposed to other communists in Asia and South East Asia? If so, all forms of peaceful relationships with Communist China could be prohibited by this Section. The Section is not limited to Governments. It specifies "<u>any persons</u>". Australian Trade Union delegations to China might be in peril for exchanging information concerning industrial conditions in the two countries.

<u>Section 24 AB</u> introduces the new offence of "sabotage" which, like the offences of treason and treachery, may be committed in peace time as well as in war time.

On the face of it, the gist of this new offence is the destruction, damage or impairment, for a purpose prejudicial or intended to be prejudicial to the safety or defence of the Commonwealth, of articles used or intended to be used in the Commonwealth by the Defence Forces or by the armed forces of a proclaimed country. The punishment provided by the Act is fifteen years.

The crucial question in relation to this newly created offence is that of "purpose". A certain act may be accidental or it may equally be capable of being considered deliberate. The Section sets out to make it easy for the prosecution to prove the offence of sabotage by facilitating proof of "purpose prejudicial". It introduces, by sub-section (3) (as well as in the new Sections 78 (2)(a) and 79 (7)), an evidentiary provision which is repugnant to all accepted forms of criminal justice, and which is dangerous to civil liberty and entirely unjustified even in time of the gravest national emergency.

A similar provision exists in other criminal legislation, e.g., Section 72 (9) of the Victorian Police Offences Act, 1928, which deals with "rogues and vagabonds" and "known thieves" or cheats. In the Victorian Section, however, the requirements of the Section are cumulative not alternative. Thus, "he may be convicted if from the circumstances of the case and from his known character as proved to the Court it appears that his intention was to commit a felony or misdemeanor".

There are several grave objections to this procedural requirement wherever it appears in the Act. In Section 24 AB, it may be used to prove that an act which may be perfectly innocent was done by a person with a "known character" and this would be sufficient to give the act its "guilty character"..

The objections are:

(i) As Professor Sawer has pointed out in his comment in "Nation" of September 24, 1960, the provision could be interpreted so as to save the prosecutor from having to prove any guilty act at all - mere bad character would be enough. The Attorney General (Hansard page 1030) says that the Crown must still prove the act of damage or destruction or impairment; but, as drafted, the Section is open to the possible interpretation suggested by Professor Sawer.

(ii) Under sub-section (3), the accused's "conduct" may be used in evidence against him to show that his purpose was "prejudicial". As pointed out by Professor Julius Stone ("Sydney Morning Herald", 26th September), if the words "his conduct" mean "his conduct in

relation to the act charged" this should be made clear by amendment. If the words are given their literal meaning, they would allow the prosecution to prove some unrelated act of the accused many years before as evidence of a prejudicial purpose in the act charged against him. This is contrary to all accepted standards of British justice. Such evidence has always been excluded in British Courts as unduly prejudicial to the accused.

(iii) The admissibility of evidence of the accused's "known character" is open to serious objection.

(a) The only types of offences in which it has been thought permissible to depart from the accepted rule of excluding evidence of character except when raised by the accused himself are those offences in which the offence itself requires proof of the character of the accused. Thus, in Section 72 (9) of the Victorian Police Offences Act, it is an offence for a known thief or known cheat to loiter in certain places at night without lawful excuse. The Court is entitled to draw the inference that a known thief loitering in an unauthorized place at night has a felonious intention. It is clear enough what meaning is to be attributed to the words "known character" in that sub-section. But what meaning is to be given to the expression "known character" in these new provisions in this Bill? Since the offences created are of the "politico-security" type, and since the "security" danger to Australia comes from Communist countries abroad and "Communists" at home, the only intelligible meaning to give to the expression in the context of this Bill is that it means "political associations and proclivities". So that, where a worker in a factory does some act which impairs the working of a machine, and the circumstances are equally consistant with the act being accidental or deliberate, evidence may be given to show that he is or had been a communist, or had expressed pro-communist views at some time past or present, or had attended a "Peace Conference" at which some Australian or "Western" policies had been attacked, or had protested against "Apartheid" or had otherwise been associated with some humanitarian or anti-Government or "leftist" cause. It is quite plain that the Bill contemplates

that these matters of "known character" will weigh against the accused. The Section expressly permits the introduction of evidence which would otherwise be strictly excluded, the purpose of the evidence being to facilitate proof of guilt where no overt act showing a criminal purpose is proved against the accused.

(b) It is important to remember that these crimes of "treason", "treachery", "sabotage" and "espionage" are crimes with respect to which public feeling often runs high, not only in war time but also in the atmosphere, highly charged at times, of the cold war. Experience of the 1951 Referendum campaign and the Petrov Royal Commission shows that there is a widespread inability not only in the community generally but in the Security Service itself, to distinguish between communists and a wide variety of other citizens who are not communists but who, by reason of their resistance to conformist pressures, have been labelled "communistic" or "traitorous" or "disloyal" or "subversive". If proof of proclivities is enough to convict a person of sabotage without the need for proving a particular act showing the criminal purpose, then citizens who hold unorthdox views will work at their peril in the places referred to in Section 78.

(c) In the criminal Courts, a person may be regarded as of good character notwithstanding that he is a communist of "leftist" or otherwise holds non-conformist or unorthodox views. Is the same person to be regarded as a person whose character is "known unfavourably" when he is a person accused of sabotage or espionage? Is this what the Attorney General means when he refers (Hansard, page 103a) to the common-sense practice of allowing "the character to be weighed to show the quality of the act"?

(d) It is no answer to the criticism of this "known character" provision to say that it appeared in the 1914 Act (Section 78 (2) and has remained there ever since. It is still objectionable by all the established standards of fairness in criminal justice. It may further be noted that this Bill proposes the use of the provision as a device to facilitate proof in a greatly increased number of offences. So that it will, if the Bill is passed, become a regular feature of prosecutions launched under the Act.

Clause 46 of the Bill repeals Section 70 of the Act and replaces it with two sub-sections relating to the disclosure of information by Commonwealth officers and by former Commonwealth officers.

The new Section 70 (1) substantially re-enacts the former Section 70, making it an offence (punishable by two years imprisonment) for a Commonwealth officer to disclose information which it is his duty not to disclose. Sub-section (2) makes it a similar offence for a person who has been a Commonwealth officer to publish or communicate, without lawful authority or excuse (proof whereof shall lie upon him), any fact or document are to his knowledge or into his possesion, by virtue of his office, and which, at the time when he ceased to be a Commonwealth officer, it was his duty not to disclose.

This latter sub-section is open to substantial criticism on several grounds:

(a) It is not confined to the disclosure of matters which are plainly and genuinely "secret" matters (e.g. defence secrets), but is wide enough to cover thousands of matters which are not really "secret" at all. There are few words more absolute in sound but more relative in reality than the word "secret". What is "confidential" or "secret" today may be common knowledge tomorrow.

(b) As applied to the Public Service, there are many matters which may be "secret" or "confidential" at a given time, not because they are intrinsically secret matters involving the safety or security of the country, but because they arise at certain stages of the formulation of Government or Departmental "policy". The reason for the matter being "restricted" or "confidential" or "secret" may disappear once a new phase of policy-making is reached or once the policy itself becomes a matter of public or, perhaps, general inter-Departmental knowledge.

(c) The "duty not to disclose" may not always be clearly defined. It may be that there is an instruction in writing about certain matters which must not be disclosed. This is unlikely if the

fact or document is genuinely a secret matter. It may be that in certain Commonwealth undertakings everything is "secret"; so that no fact or document coming to the knowledge of or into the possesion of the officer may be disclosed. But this can only be so in rare cases. In the general run of cases, there is unlikely to be any very precise instruction or direction in relation to any particular fact or document.

This circumstance alone would place great hardship on a former Public servant who contemplated publishing material which included facts which had come to his knowledge whilst an officer of the Commonwealth. He would have to seek specific authority for the publication, perhaps many years later, of each fact which he proposes to publish. He would have the onus of proving that he had been given such authority. Such authority might well prove difficult to obtain, especially if much time has elapsed since the person ceased to be a Commonwealth officer. At such later time, what person has the authority to "unfreeze" the fact and permit its publication?

(d) Again, with the passing of the years, the human memory becomes more fallible. Fact and opinion are not always easy to separate in retrospect. There is no limitation of time in the provision, so that the duty not to disclose remains with the officer until his death, unless he either obtains specific authority to publish the fact or document (the only safe way for him) or takes the risk with a fact or document which appears to have become public knowledge with the passage of time. In the latter event, he could not prove "lawful authority" and it may well be doubted whether the circumstance that the fact had become public knowledge would constitute "lawful excuse" under the sub-section.

(e) The matter of criticism mentioned in (a) to (d) are sufficient to show that the offence created by sub-section (2) is dangerously wide and likely to "muzzle" former Public servants and to inhibit them from publishing information and comment on problems in which they may have had wide experience and to the

public understanding of which they may have much to contribute. The provision could be used not only to punish former Commonwealth officers, but, just as importantly, to prevent the publication of information embarrassing to the particular Government at the time of the proposed publication but nevertheless having no real "secret" or "security" aspect about it. Like a number of other clauses in this Bill, this provision would operate as a deterrent. It is no answer to say that "responsible" former officers will not be in peril if they are careful what they publish. The true position is that responsible former officers will not publish at all, and the whole community may be the poorer for it. This provision strikingly illustrates the proposition that civil liberties are generally in danger when persons fear to exercise the freedoms which they do in fact and in law possess.

In the amending Bill, Part VII - Espionage and official Secrets - replaces Part VII - Breach of Official Secrecy - in the old Act. Sections 77, 78 and 79 are repealed.

The proposed Section Section 77 (the Interpretation Section) introduces a startlingly wide definition of "information" as meaning "information" of any kind whatsoever, whether true or false, and whether in a material form or not, and includes an opinion and a report of a conversation.

Section 78 is the new Espionage Section, replacing the old "unlawful spying" section. The substance of the offence is the making, collecting, obtaining, using, having in one's possession or communicating to another, etc., for a purpose prejudicial or intended to be prejudicial to the safety or defence of the Commonwealth or a part of the Queen's dominions, of any sketch, plan, photograph, etc., document, article or information, that is likely to be, might be, or is intended to be directly or indirectly useful to an enemy or a foreign power.

There are several weighty objections to this Clause:

(a) The "information" of the subject matter of the "espionage" need not be secret defence or security information. The information

is not limited to "prescribed information", as in the proposed Section 79. It may be economic or social or cultural information. The offence is committed if the information might be (i.e., could possibly be) directly or indirectly useful not merely to an enemy (undefined) or to a foreign power (undefined), provided there is a criminal purpose (as defined).

(b) A person who has in his possession e.g. (i) a document containing statistics relating to recruitment of students to Universities in the various faculties or (ii) a document being the minutes of a Trade Union Conference or (iii) a document being a map of Australia, has a document which might be at least indirectly useful to an enemy or a foreign power (presumably this can mean any foreign country whatever).

If he is a Communist or is so regarded by the Security organisation, this may be proved against him as proof of a criminal purpose, and he may be convicted of espionage, nothwithstanding that he has committed no overt act evidencing the "purpose prejudicial".

(c) "A foreign power" may be an enemy power, a potential enemy, or a friendly power. It is a fantastic proposition that a person in possession of a document or information which may have nothing whatever to do with defence or security, which may be false, or which may be merely an opinion or a report of a conversation, and which might be indirectly useful to a friendly power, may be convicted of espionage on his conduct alone or on his known character alone, without any particular act on his part tending to show a purpose prejudicial.

(d) As to sub-section 1(c), a person who is in the "neighbourhood" of a prohibited place is there at his peril. Proof that he is in the neighbourhood, together with proof of his conduct or his known character, is sufficient to convict him under Section 78 and he is liable to imprisonment for seven years. The Government would again seem to be indebted to such precedents as the Victorian Police Offences Act - e.g., Section 72 (9) which deals with a known thief or known cheat loitering with intent to commit a felony.

(e) The Section also has the same obnoxious evidentiary provision relating to proof of prejudicial purpose, as appears in Section 24

AB (3), that is, the "conduct of the accused or the known character as proved" may be relied upon as proof of purpose, nothwithstanding the absence of any overt act evidencing intention.

(f) The Section (sub-section 2(b)) has a further provision, objectionable according to the accepted standards of criminal justice in British communities, which places upon the accused the onus of proving that any document, information etc. relating to or used in a prohibited place, etc., and used by him or in his possession, etc., was not used or possessed, etc, for a purpose prejudicial to the safety or defence of the Commonwealth or a part of the Queen's dominions. In the absence of such proof by the accused, the information, etc, shall be deemed to be possessed, used, etc, for such a prejudicial purpose.

The new Section 79 contains provisions relating to the unauthorized communication of official secrets, similar to those in Section 78 regarding espionage. Here there is no offence unless the information communicated is "prescribed information". Such "prescribed information", in the case of present or former Commonwealth officers, is information which, by reason of its nature or the circumstances under which it was entrusted to him or it was made or obtained by him or for any other reason, it is his duty to treat as secret.

Again, there is no specification that the information, etc, must have some direct or indirect connection with the defence or security or safety of the Commonwealth. If it was the officer's duty to treat it as secret for any reason, and there is evidence of the communication, that is sufficient for a conviction, taken together with evidence of "conduct" or "known character as proved". For under this Section also (sub-section (6)), the same objectionable evidentiary provision appears as in Sections 24 AB (3) and 78 (2).

It should also be noted that sub-sections (5) and (6) place the onus upon the accused of proving that any "communication" to him in contravention of Section 78 or Section 79 (2) or 79 (3) was "contrary to his desire". This provision appeared, in substance, in the old Section 79 (2). The present sub-sections (5) and (6)

greatly extend the number of offences in which the accused carries such an onus of proof. It is a heavy onus, as "contrary to his desire" means, presumably, against his will. Since the gist of the offence is that the accused knew that the communication was made to him in contravention of the Act, the only reasonable meaning that can be given to the expression "contrary to his desire" is that he was under duress and that the communication was forced upon him. It would undoubtedly require most cogent evidence to discharge the onus of proving facts which would support such a defence!!
